

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 139/2001

Mr. Shaik Hussain Shaik Musa,
major in age, married, businessman,
Mutawalli, Madina Masjid, residing at
Sultan Lodge, Swatantra Path,
Vasco-da-Gama.

..... Petitioner.

V/s.

1. Mr. Masood Ali Ahmed Ali,
major, married, businessman,
residing at Dias Building, 2nd Floor,
New Vaddem, Vasco-da-Gama.

2. Mr. Hussain Gazi Zainul Abedin,
major, married, businessman,
residing at House No.414,
Near Gazi Bus Stop,
New Vaddem, Vasco-da-Gama,

3. Mr. Mohammad Badruduza
Maulana Jamaluddin, major,
married, business, residing at Sada,
Madrassa Moinul-Quran, Opp Govt.
Football Ground, Headland,
Vasco-da-Gama

..... Respondents.

Ms. Amira Razak, Advocate for the petitioner.

Ms. Anita Thorat, Advocate for respondent No.2.

CORAM : P.V. KAKADE, J.

DATE : 27th November, 2006.

ORAL JUDGMENT :

Heard learned Counsel for both the parties. Perused the record.

2. This revision is preferred by the petitioner-defendant against the order passed by the trial Court in Special Civil Suit No. 65/99, dismissing the defendant's application Exhibit-8 under Order 7, Rule 11(d) of the Civil Procedure Code, which was filed praying that the suit was liable to be disposed of by virtue of the said provision on the ground that it was barred by special law ie. The Wakf Act, 1995.

3. The original defendant is the Mutawalli of Madina Masjid situated at Vasco-da-Gama. The plaintiffs filed the suit for declaration, rendition of accounts, removal of Mutawalli and ex parte appointment of Court Receiver. In the said application, it was submitted by the present appellant-defendant that the suit was brought by the plaintiffs in respect of the wakf property of Madina Masjid wherein the plaintiffs prayed for the relief under Section 92(a), (d), and (h) of the Code of Civil Procedure. It was alleged in the plaint that there was breach of a constructive trust of religious nature. The suit was not brought by the Advocate General and

therefore, the plaintiffs must obtain leave of the Court to institute the suit. No such leave was obtained by the plaintiffs. Further it was alleged that the principal Civil Court of original jurisdiction was the District Court and the State Government had not issued any notification conferring such jurisdiction in the Civil Court and as such, it was submitted that the plaintiffs' suit was liable to be rejected by virtue of Order 7, Rule 11(d) of the C. P Code.

4. It is an admitted as well as evident position that the Wakf Act, 1995 was extended and made applicable to the whole of India, including State of Goa, except the State of Jammu and Kashmir. The Central Government has issued Notification dated 27.11.1995, appointing 1.1.1996 as the day on which the Act shall come into force and, accordingly, it has come into force on and from 1st January, 1996. The Wakf Act was already implemented in Goa by due process of law and as a matter thereunder, the Survey Commissioner was duly appointed by the State of Goa for the purpose of making survey and identifying the wakfs existing in the State of Goa and, therefore, consequent establishment of machinery called “wakf board” eventually follows the completion of the said work. Therefore, the Act has de jure and de facto application in the State of Goa. These are the statements made in the plaint itself. However, it was further

submitted that due to nonexistence of wakf board, there was no statutory body to ensure accountability of the financial affairs of the said mosque. It was allegedly mismanaged by the present appellant-defendant which gave rise to the suit. The plaintiffs have also challenged the very appointment of the defendant as the Mutawalli as he was appointed by his predecessor who was his father-in-law on 20.5.1994 through a letter on account of his ill-health (not on his death-bed). It is submitted on behalf of the plaintiffs that under Islamic Law, the Mutawalli, for the time being, may appoint a successor on his death-bed, meaning thereby he cannot do so while he is in health or mere ill-health, distinguished from death-bed. On such and other grounds, the appointment of the defendant as Mutawalli came to be challenged along with other allegations such as mismanagement of the wakf property by way of suit for declaration and consequential relief of perpetual injunction as well as seeking the order regarding rendering of accounts etc.

5. In the wake of this plaint, the application under Order 7, Rule 11(d) of the C.P. Code came to be filed, which was, after hearing both sides, came to be dismissed by the trial Court on the ground that the Civil Court had jurisdiction to entertain and adjudicate the suit inspite of the specific bar under the special Act ie. Wakf Act, 1995. Hence, the

present revision petition.

6. Now the provision of Section 85 of the Wakf Act, 1995, read thus :

“85. Bar of Jurisdiction of civil courts. - No suit or other legal proceeding shall be in any civil court in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.”

Section 3(q) of the said Act, makes a provision for establishment of Tribunal under sub-section (1) of Section 83 having jurisdiction in relation to that area. Chapter VIII, Section 83 of the said Act deals with provision for constitution of Tribunal, etc. and thereunder it is directed that the Tribunal shall be established for a particular area to be notified in this regard. The Act also provides survey of wakf by virtue of Section 4 thereof. Section 6 stipulates that if any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final. Rider is

also provided to this provision to the effect that suit shall be within a period of one year from the date of publication of the list of wakfs.

7. Therefore, as the matter stands today, the surveyor of the wakfs property contemplated under Section 4 of the said Act is, in fact, appointed which fact was not to the knowledge of the trial Court when the application was decided. The moot question is whether the suit would lie in the absence of establishment of a Tribunal as contemplated under the said Act. The learned Trial Judge has come to the conclusion that in the absence of wakf board and considering the reliefs prayed in the suit, the Court would have jurisdiction to entertain the suit.

8. In this regard, it must be noted that the Apex Court has laid down the principles for determination of the question of jurisdiction of the Civil Court in its ruling in the case of ***Church of North India vs. Lavajibhai Ratanjibhai and ors.***, (2005) 10 SCC 760. The Ape Court while referring to its earlier Judgment in the case of ***Dhulabhai v. State of M.P.*** (1968) 3 SCR 662, has laid down the basic principles of law, which are as under :

“(1) Where the statute gives a finality to the orders of the Special tribunals, the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do

what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the Court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under the Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act, but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply”

In my considered view, this would aptly apply to the present situation at hand, especially when there is an express bar on jurisdiction of the civil Court on examination of the scheme of the particular Act to find out the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil Court. No doubt, this ruling was with regard to the provision of the Bombay Public Trust Act, 1950, however, the principles laid down therein are befitting to the case

at hand.

Similar was the principle laid down by the Apex Court in the case of *Kanbi Manji Abji and ors. vs. Kanbi Vaghji Mavji and ors.* 1993 Supp (4) SCC 351, wherein it is laid down that the special provision of law would prevail over the general provision and would oust the jurisdiction of the Court of ordinary civil jurisdiction.

9. There is no dispute in whatsoever manner that the ouster of exclusion of the Civil Court is not to be readily inferred. The test to be applied while examining the question whether the civil Court had jurisdiction, would be (i) the legislative intent to exclude arises explicitly or by necessary implication; and (ii) the statute in the question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under the statute. In the present case before us not only the legislative intent is clear by provision of the special Act, but also there is special remedy provided under the statute. Therefore, I am of the view that the civil Court of ordinary jurisdiction will not be a competent Court to entertain this matter which is ultimately touching to the business of the wakf. Therefore, the provision of Section 85 of the Wakf Act has to be given effect by letter and spirit.

10. The learned Counsel for the respondents sought to place reliance on the ruling of the Apex Court in the case of ***Ramesh Chand Ardawatiya vs. Anil Panjwani***, (2003) 7 SCC 350. However, on perusal of the said ruling, it must be noted that it only lays down that an exclusion of jurisdiction of the Civil Court is not to be readily inferred and further an objection as to the exclusion of the civil court's jurisdiction for availability of an alternative forum should be taken before the trial Court at the earliest. In my considered view, both these conditions are fulfilled by the defendant when it is found that the application under Order 7, Rule 11 (d) of the C.P. Code was filed at the earliest opportunity. Moreover, this ruling also lays down that the question of determination of jurisdiction is required to be determined primarily on the basis of the averments in the plaint. If we take into account the contents of the plaint in this case, there is no doubt whatsoever and, in fact, it is an admitted position that the plaint is squarely covered by Section 85 of the Wakf Act and, therefore, this question cannot be said to be debatable in view of the admission on behalf of the plaintiffs itself.

11. Therefore, for the reasons recorded above, I hold that the reasonings adopted by the trial Judge while dismissing the application under 7, Rule 11(d) of C.P. Code are not founded on sound legal principles

and, therefore, the order has to be set aside. '

12. In the result, the application Exhibit – 8 is, thereby, granted. The revision petition is allowed in terms of prayer clauses (b) and (c) and stands disposed of with no order as to costs.

P.V. KAKADE, J.

ssm.